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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 210

HARRY EPSTEIN, IRVING EPSTEIN, AND LENA EPSTEIN, CO-PARTNERS, D/B/A TOP MODE MANUFACTURING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL A. SCHRECKENGAUST, JR.,
JAMES M. QUIGLEY,
McNESS, WALLACE & NURICK,
Counsel for Petitioners.

Twelfth Floor
Commerce Building
Harrisburg, Pennsylvania

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Harry Epstein, Irving Epstein and Lena Epstein, Co-partners, d/b/a Top Mode Manufacturing Co., respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Third Circuit, having been rendered on April 15, 1953, and having become final on May 19, 1953, upon which date the said Court of Appeals issued its decree enforcing an order of the National

Labor Relations Board, following denial of a timely petition for rehearing.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. Sec. 1254(1).

The opinion of the Court of Appeals for the Third Circuit was filed on April 15, 1953, a petition for rehearing was denied on May 7, 1953, and a decree enforcing an order of the National Labor Relations Board was issued on May 19, 1953.

Opinions Below

The Decision and Order of the National Labor Relations Board are printed in the Appendix to Petitioners' Brief, R. 5a, and are reported in 97 NLRB (No. 197) (1952).

The opinion of the Court of Appeals appears in 203 F.2d 482 and is also printed in the record.

Question Presented

The question presented by this petition is:

Where the Union's original charge against the Employer was filed with the National Labor Relations Board on September 28, 1949, and served on October 3, 1949, and an amended charge was filed on March 30, 1951, and served on April 2, 1951, is the Board precluded under the provisions of Section 10(b) of the National Labor Relations Act from making any findings of fact or conclusions of law as to alleged unfair labor practices which involved the conduct of the Employer during the period from October 3, 1949 to October 2, 1950?

Statute Involved

The Labor Management Relations Act of 1948, 48 Stat. 926 (1934) as amended, 62 Stat. 991 (1948), 29 USCA §

160(b) Supp. 1952 and in particular the pertinent proviso of Section 10(b) therefor which provides in part as follows: 29 USCA Sec. 160 10(b), 61 Stat. 146:

> "Provided, that no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

Statement

Harry Epstein, his brother, Irving Epstein, and their mother, Lena Epstein, are co-partners trading and doing business as Top Mode Manufacturing Co., in the Borough of Dauphin and the City of Harrisburg, Pennsylvania, as manufacturers of washable cotton house dresses. These dresses are manufactured from cotton piece goods and other materials of which more than 50 percent is obtained from without the Commonwealth of Pennsylvania and approximately 70 percent of the finished product is shipped and sold outside of the Commonwealth of Pennsylvania.

Shortly before August 1, 1949, the Petitioners in this case opened a manufacturing plant in the Borough of Dauphin, Pennsylvania. On August 30, 1949, they received a letter dated August 29, 1949, from the manager of Local 108, International Ladies' Garment Workers' Union, A.F. of L. stating that that labor organization represented a majority of the employees in an appropriate unit in the Dauphin plant and requesting a meeting, "to negotiate a collective bargaining agreement concerning the subject of union recognition, wages, hours and working conditions." To this letter Harry Epstein replied on September 2, 1949, stating that because of the holiday (Labor Day) his plans were uncertain but that he would be in touch with the Union during the following week on the matters raised in its letter of August 29. The Union's letter of August 29 was further

replied to by the attorney for the Petitioners on September 6, 1949, that:

> "We have reviewed the matter with him and have advised him that for the protection of all concerned he should insist that Local 108 of the ILGU be properly certified as the collective bargaining agent before he agreed to negotiate."

On September 7, upon receipt of the Petitioners' letter of September 6, the Union petitioned the National Labor Relations Board to investigate its claim of representation of the majority of the Petitioners' employees in the Dauphin plant. Pursuant to this petition, a meeting of the parties was arranged by a field examiner of the Board and held in the Petitioners' office in Dauphin on September 20, 1949. At the conclusion of this meeting the parties executed a consent election agreement authorizing the Board to conduct an election by secret ballot on October 17, 1949, among the employees of the Petitioners in a unit that was agreed to be appropriate to determine the question of whether or not the Union did, in fact, represent a majority of the Petitioners' employees in the Dauphin plant. However, on September 28, 1949, the Union petitioned the Board to withdraw from this consent election agreement, which petition was allowed, and at the same time the Union filed unfair labor practice charges against the Petitioners.

Although the Regional Office of the Board began its investigation of these charges immediately, no disposition of the matter was made for a period of a year and one-half. Finally, on March 30, 1951, the Union filed an amended charge against the Petitioners setting forth the identical allegations as appeared in the original charge. On April 2, 1951, this amended charge was served on the Petitioners and at the same time a Complaint was issued by the General Counsel against and served upon the Petitioners to which an Answer

was filed on April 11, 1951, and a hearing on the issues thus raised was held beginning on April 16 and concluding on April 27, 1951.

Petitioners have consistently contended, inter alia, throughout this case, that the Board was precluded from making any findings of unfair labor practices alleged to have occurred in the period subsequent to October 3, 1949 (the day on which the original charge was served) and prior to October 2, 1950 (six months prior to the serving of the amended charge).

The Board completely ignored Petitioners' contention as aforesaid. The Court of Appeals for the Third Circuit, however, considered the argument and rejected it, despite the fact that in a decision rendered on March 10, 1953, the Court of Appeals for the Seventh Circuit reached a contrary conclusion in the case of *Indiana Metal Products Corp.* v. *National Labor Relations Board*, 202 F. 2d 613, 619. Petitioners base their petition for certiorari on this narrow ground.

Specification of Error to Be Urged

In holding that the conduct of Petitioners after the filing and serving of the first unfair labor charges against them on September 28, 1949 and more than six months before the filing and serving of the amended charge on April 2, 1951 constituted unfair labor practices, said holding being in violation of the clear wording and obvious meaning of Section 10(b) of the National Labor Management Relations Act.

Reasons Relied On for Granting the Writ

I

The decision below is in open and admitted conflict with a decision of the Court of Appeals for the Seventh Circuit.

In reaching the decision that it was not precluded, under

the provisions of Section 10(b) of the Act as amended, from making any findings of unfair labor practices based on the conduct of the Petitioners after the filing of the first charge and more than six months before the filing of the amended charge, the Court of Appeals of the Third Circuit clearly recognized that it was giving a completely contrary interpretation to that section of the law than had been given just one month earlier by the Court of Appeals of the Seventh Circuit. In the opinion below the Court of Appeals of the Third Circuit stated that, "We are not unaware of the holding to the contrary by the Seventh Circuit in Indiana Metal Products Corp. v. National Labor Relations Board, 6 C.C.H. Lab. Law Rep. Par. 67,446 (decided March 10, 1953). With due deference, we are forced to disagree."

The Indiana Metal Products Corp. case involved a factual situation identical with the one presented in the present proceedings and the Court of Appeals for Seventh Circuit in applying the statute of limitations provisions of Section 10(b) of the Act, stated:

> " . . . *each event was subsequent to the filing and the service of the first charge and more than six months prior to the filing and serving of the amended charge. We hold that the Board was not warranted in basing a finding of unfair labor practice upon either of these occurrences.*" (Italics supplied.)

Thus, the issue is clearly drawn. In two cases involving comparable factual situations, two different Circuit Courts of Appeal have given diametrically opposed interpretations to the meaning and operation of Section 10(b) of the Labor-Management Relations Law. The issue is all the more clear-cut by reason of the fact that the Court of Appeals for the Third Circuit knowingly and openly refused to accept and to follow the interpretation of the law made by the Court for the Seventh Circuit. In view of the inevitable con-

fusion which these conflicting opinions must cause, it is submitted that there is here presented to the Court the classical situation in which it has traditionally issued a writ of certiorari in order that the difference of judicial opinion might be resolved and the meaning of the law made clear.

II

The decision below involves an important question of federal law.

It is in the public interest for this Court to review and resolve an important and unsettled question on the construction of the Labor Management Relations Act of 1947. Certiorari has been granted in a substantial number of cases, as in *Federal Land Bank of St. Louis* v. *Preddy*, 295 U. S. 229, 55 S. Ct. 705, even in the absence of any conflicting decisions, to review a decision of a lower court involving the construction of a federal statute. The meaning, the scope and the effectiveness of the proviso added by the 1947 amendment to Section 10(b) of the Federal Labor Relations Law is of vital significance to a substantial number of persons in every state in the nation, including many employers, employees, representatives of management, officers of labor organizations and those employees of the federal government charged with the responsibility of administering the basic law. It is important to these many people and in the public interest, generally, that this Court give its final judicial answer to the question legally answered "No" by the Court below and "Yes" by the Court of Appeals for the Seventh Circuit.

III

The decision below is in error.

The decision of the Court of Appeals for the Third Circuit is believed to be erroneous. Some of the reasons to sustain

this contention are set forth in the several cases which have considered the problem of the belated amendment to a timely charge. An analysis of these decisions indicates clearly that a correct statement of the law is that amendments of a charge, like the original charge itself, must be filed and served within six months except in those cases where the amendment relates back to unfair practices inherent in, or connected with, the original charge. Thus, in *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8, 15 (C. A. 1) the court stated, "*The second amended charge,* filed November 28, 1949, *was timely filed, within the requirement of Section 10(b) that the filing of a charge with the Board must take place within six months after the occurrence of alleged unfair labor practice.*" (Italics supplied). See also *Stokley Foods* v. *N. L. R. B.*, 193 F. 2d 736, 737 (C. A. 5); *Jonna Cotton Mills Company* v. *N. L. R. B.*, 176 F. 2d 749 (C. A. 4); *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (C. A. 9); *N. L. R. B.* v. *Royal Palm Ice Co.*, 193 F. 2d 569, 570 (C. A. 5).

The exception to the basic rule that the amended charge must be filed within six months following the events to which it refers was spelled out in the case of *Cusano* v. *N. L. R. B.*, 190 F. 2d 898 (C. A. 3) where the court ruled that the belated amended charge could be related back to the original charge when "both the original and amended charges are based on the *identical fact situation.*" And decisions to the same effect were given in the cases of *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719 (C. A. 2) and *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8 (C. A. 1).

It is respectfully submitted that the interpretation given to Section 10(b) by the Court below was in error and that without the commission of this fundamental legal error there would be no case against the present Petitioners. By excluding from the Board's findings that which the Taft-Hartley statute of limitations provision requires to be ex-

cluded, it is suggested that there is little of substance left to the case against the Epsteins and what little remains is built upon such a faulty and questionable factual foundation that it cannot support the drastic remedy prayed for by the Board and ordered by the Court below.

Conclusion

For the foregoing reasons it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court and that this petition for a writ of certiorari should be granted.

HARRY EPSTEIN, IRVING EPSTEIN, and
LENA EPSTEIN, D/B/A TOP MODE
MANUFACTURING CO.,
By SAMUEL A. SCHRECKENGAUST, JR.,
JAMES M. QUIGLEY,
Counsel for Petitioners.

McNEES, WALLACE & NURICK,
Twelfth Floor
Commerce Building
Harrisburg, Pennsylvania